IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE THOTTATHIL B.RADHAKRISHNAN

WEDNESDAY, THE 12TH DECEMBER 2007 / 21ST AGRAHAYANA 1929

WP(C).No. 22146 of 2007(J)

PETITIONER:

MR. A.P.VARGHESE, AGED 50 YEARS,
S/O. LATE POULOSE, MANAGING DIRECTOR,
M/S. ST.GEORGE CABLES (P) LTD., PEECHANIKAD,
PULIYANAM P.O., ANGAMALY, ERNAKULAM DISTRICT.

BY ADV. SRI.SUNIL V.MOHAMMED,
ADV. SRI.B.RENJITH MARAR.

RESPONDENTS:
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1. **THE KERALA STATE CO-OPERATIVE BANK LTD., REPRESENTED BY THE MANAGING DIRECTOR, CO-BANK TOWER, THIRUVANANTHAPURAM.**

2. **THE DEPUTY GENERAL MANAGER, (AUTHORISED OFFICER), THE KERALA STATE CO-OPERATIVE BANK LTD., REGIONAL OFFICE, DORAISWAMY IYER ROAD, KOCHI-35.**

3. **THE UNION OF INDIA, REPRESENTED BY THE MINISTRY OF FINANCE & COMPANY AFFAIRS, (DEPARTMENT OF ECONOMIC AFFAIRS), (BANKING DIVISION), NEW DELHI.**

R1 & R2 BY SRI.NAGARAJ NARAYANAN,SC,K.S.CO-OP BANK,
R3 BY SRI.P.PARAMESWARAN NAIR,ASST.S.G.

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 14/11/2007,ALONG WITH W.P.(C). NO. 29401/ 2007 AND CONNECTED CASES, THE COURT ON 12/12/2007 DELIVERED THE FOLLOWING:

W.P.(C). NO.22146/2007:

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P.1: COPY OF THE NOTICE ISSUED U/S. 13 (2) OF THE SARFAESI ACT, 2002 ISSUED BY THE R.2.

EXT.P.2: COPY OF THE NOTIFICATION DTD. 28/01/2003 ISSUED BY THE R.3.

EXT.P.3: COPY OF THE REPRESENTATION DTD. 11/11/2006 PREFERRED BY THE PETITIONER BEFORE THE R.1.

EXT.P.4: COPY OF THE APPEAL PETITION DTD. 12/01/2007 PREFERRED BY THE PETITIONER BEFORE THE GENERAL MANAGER, DISTRICT INDUSTRIES CENTRE, ERNAKULAM.

EXT.P.5: COPY OF THE CIRCULAR DTD. 03/05/2007.

RESPONDENT'S EXHIBIT:

EXT.R1.A: COPY OF THE IIND SCHEDULE OF THE RESERVE BANK OF INDIA ACT 1934.

//TRUE COPY//

P.S. TO JUDGE

prv.

THOTTATHIL B. RADHAKRISHNAN, J.

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WP(C).Nos.22146/2007-J, 29401/2007-A,

30189/2007-R, 31500/2007-Y, 31743/2007-D,

31919/2007-Y, 32228/2007-J & 32294/2007-T

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Dated this the 12th day of December, 2007.

JUDGMENT

"CR"

1. Are the Kerala State Co-operative Bank, the District Co-operative Banks and the Urban Co-operative Banks entitled to invoke the provisions of the Central Act 54/2002, hereinafter referred to as the "SARFAESI Act"? This is the issue involved in these writ petitions.

2. Section 13(1) of the SARFAESI Act authorizes a secured creditor to enforce a security interest, without the intervention of the Court or Tribunal, in accordance with the provisions of that Act. The different clauses of Section 2(1), forming the interpretation clause of that Act are

relevant in this context. Clause (zf) defines "security interest". Clause (zd) defines a "secured creditor" to mean any bank or financial institution or any consortium or group of banks or financial institutions in whose favour security interest is created for due repayment, by any borrower, of any financial assistance and includes the different entities enumerated in sub-clauses (i) to (iii) thereof. Clause (c) defines a "bank" to mean, among other things, going by sub-clause (v), such other bank which the Central Government may, by notification, specify for the purpose of the SARFAESI Act. The Co-operative Banks, the rights of which are dealt with in these writ petitions, can be banks for the purpose of the SARFAESI Act, only if they stand on the strength of notification in terms of Clause (c)(v).

3. The Central Government, through the Ministry of Finance and Company Affairs (Department of Economic Affairs) (Banking Division), have issued

notification dated 28-1-2003, in exercise of powers conferred under item (v) of clause (c) of sub-section (1) of Section 2 of the SARFAESI Act. Thereby, the Central Government specified "Co-operative Bank" as defined in Clause (cci) of Section 5 of the Banking Regulation Act, 1949, hereinafter referred to as the "BR Act" as "bank" for the purpose of the SARFAESI Act.

4. Section 56 of the BR Act provides the modifications for the application of that Act to co-operative societies. Among other things, it provides for the insertion of Clauses (cci), (ccv) and (ccvii) in Section 5 of that Act.

5. Clause (cci) in Section 5 of the BR Act defines a "co-operative bank" to mean a State Co-operative Bank, a Central Co-operative Bank and a Primary Co-operative Bank.

6. In Section 5 of the BR Act, Clause (ccvii) states, among other things, that "Central Co-

operative Bank" and "State Co-operative Banks" shall have the meanings respectively assigned to them in the National Bank for Agriculture and Rural Development Act, 1981, for short, the "NABARD Act". "State Co-operative Bank" and "Central Co-operative Bank" are defined, respectively, in Clauses (u) and (d) in Section 2 of the NABARD Act. By those definitions, "State Co-operative Bank" means the Principal Co-operative Society in a State, the primary object of which is the financing of other Co-operative Societies in the State and the "Central Co-operative Bank" means the principal Co-operative Society in a district in a State, the primary object of which is the financing of other Co-operative Societies in that district.

7. The "State Co-operative Bank", as defined in Section 2(rb) of the Kerala Co-operative Societies Act, 1969, hereinafter referred to as the "KCS Act", means an apex society having only District Co-operative Banks as its members.

"District Co-operative Bank", as defined in Clause (ia) of Section 2 of that Act, is a Central Society, the principal object of which is to raise funds to be lent to its members, with jurisdiction over one revenue district and having as its members any type of primary societies and Federal and Central Societies having headquarters in such district.

8. Therefore, the Kerala State Co-operative Bank is a "State Co-operative Bank" as defined in the NABARD Act and the District Co-operative Banks are "Central Co-operative Banks" as defined in that Act. Hence, they are "Co-operative Banks" as defined in Section 5(cci) of the BR Act, falling within the notification dated 28-1-2003, issued under the SARFAESI Act.

9. By Clause (ccv) in Section 5 of the BR Act, "Primary Co-operative Bank" means a co-operative society other than a primary agricultural credit society; (1) the primary object or principal

business of which is the transaction of banking business; (2) the paid-up share capital and reserves of which are not less than one lakh of rupees; and (3) the bye-laws of which do not permit admission of any other Co-operative Society as a member.

10. An "Urban Co-operative Bank", going by Section 2 (ta) of the KCS Act, means a Society registered under that Act and having its area of operation in the urban areas and which undertakes banking business. It is not the allegation of the petitioners that the bye-laws of the Urban Co-operative Banks permit admission of any other co-operative society as a member or that the paid-up share capital and reserves of those banks are less than one lakh of rupees. Therefore, the Urban Co-operative Banks are Primary Co-operative Banks as defined in Clause (ccv) in Section 5 of the BR Act and hence, Co-operative Banks as defined in Section 5(cci) of that Act. The Urban Co-operative Banks also, therefore, fall within

the impugned notification.

11. On the strength of Section 80(1) of the KCS Act and Rule 182 of the Kerala Co-operative Societies Rules, 1969, for short, the "KCS Rules", the societies in the State of Kerala are classified, according to their type and financial position, as shown in Appendix III to KCS Rules. "Co-operative banks", a type of societies, according to that classification, is further classified into, among other things, the Apex Banks, the Central Co-operative Banks (District Co-operative Banks) and other Banks. The State Co-operative Bank is an Apex Bank; the District Co-operative Banks are the Central Co-operative Banks and the Urban Banks fall under the category "Other Banks". Such statutory classification, according to the type of the society, is, by itself, conclusive material to hold that primary object or principal business of the State Co-operative Bank, the District Co-operative Banks and the Urban Banks in the co-operative sector is the

transaction of banking business.

12.In view of the aforesaid statutory materials and in the absence of any contention for the writ petitioners that the Kerala State Co-operative Bank Ltd., the District Co-operative Banks and the Urban Co-operative Banks involved in these writ petitions are not carrying on activities in terms of what is aforesaid, the irresistible conclusion is that they are “co-operative banks” for the purpose of Clause (cci) of Section 5 of the BR Act, so modified by Clause (c) of Section 56 of that Act.

13.As a consequence, in view of the notification issued by the Central Government on 28-1-2003 (Ext.P6 in WP(C).31919/2007), the provisions of the SARFAESI Act are available to those institutions, namely, the Kerala State Co-operative Bank Ltd., the District Co-operative Banks and the Urban Co-operative Banks, to be invoked as enjoined by Section 13 of that Act.

14. Facing the aforesaid situation emanating out of the interpretation of the relevant statutory provisions, the petitioners contend that the provisions of the SARFAESI Act cannot apply to the transactions of co-operative societies which are governed by the provisions of the KCS Act. They challenge the legislative competence of the Union in that regard, by taking the stand that "co-operative societies" is a subject included in Entry 32 of List II, the State List, in the Seventh Schedule to the Constitution. On such basis, it is argued that in the absence of a power with the Union to make a primary legislation touching co-operative societies, the power of the Central Government to issue a notification in terms of Section 2(1)(c)(v) of the SARFAESI Act, does not include the power to notify a co-operative bank as a bank for the purpose of that Act. The Central Government's notification dated 28-1-2003 is also specifically challenged in some of these writ petitions.

15.In support of the challenge, considerable reliance is placed on the decision of the Apex Court in Greater Bombay Co-op. Bank Ltd. v. United Yarn Tex (P) Ltd. [2007 (3) KLT 302 (SC)], hereinafter referred to as the "GBCB". Reference was also made on behalf of the petitioners to the decision of the Apex Court in Virendra Pal Singh v. District Assistant Registrar [(1980) 4 SCC 109] and the decision of the Bombay High Court in Nagpur District Central Cooperative Bank Ltd. v. Divisional Joint Registrar, Cooperative Societies (AIR 1971 Bom. 365) laying down that the provisions for banking activities by co-operative societies, do not take the U.P.Co-operative Societies Act, 1965 and Maharashtra Co-operative Societies Act, 1960, respectively, out of the purview of the Entry 32 in List II.

16.To insist on the precedential value of the verdict in GBCB, reference is made on behalf of the petitioners, to the decisions of the Apex

Court in I.T.Commissioner v. Vazir Sultan & Sons (AIR 1959 SC 814), State of U.P. v. Synthetics and Chemicals Ltd. [(1991) 4 SCC 139] and Municipal Corpn. of Delhi v. Gurnam Kaur [(1989) 1 SCC 101] explaining the doctrines of obiter dicta, perincuriam and sub-silentio.

17.On to the constitutional issues raised.

18.Section 35 of the SARFAESI Act provides that the provisions thereof shall have effect, notwithstanding anything inconsistent therewith, contained in any other law for the time being in force, or any instrument having effect by virtue of any such law. Chapter III of that Act relates to Enforcement of Security Interest. Section 13 (1) in that Chapter provides that notwithstanding anything contained in Section 69 or Section 69-A of the Transfer of Property Act, 1882, hereinafter referred to as the "TP Act", any security interest created in favour of any secured creditor may be enforced, by such

creditor, in accordance with the provisions of the SARFAESI Act, without the intervention of the Court or Tribunal. The non-obstante clause in Section 13(1) of that Act overrides the provision contained in Section 69 of the TP Act. Thereby, the general law on the subject as contained in Section 69 of the TP Act has been overridden by the special enactment, namely, the SARFAESI Act. This is a fundamental ground on which the distinctions based on types of mortgages as available in the TP Act were held to be of no consequence, by the Apex Court in Mardia Chemicals v. Union of India - see paragraph 42 of that decision as reported as 2004 (2) KLT 273 (SC). "Security interest", going by Section 2(1)(zf) of the SARFAESI Act, means right, title and interest of any kind whatsoever upon property, created in favour of any secured creditor and includes any mortgage, charge, hypothecation, assignment other than those specified in Section 31, in terms of which, the provisions of the SARFAESI Act shall not apply to the different

matters enumerated in Clauses (a) to (j) therein, including in Clause (i), any security interest created in agricultural land. An examination of the provisions of the SARFAESI Act, particularly those contained in Chapter III thereof, in the backdrop of the interpretation clause contained in Section 2 of that Act, would show that the said legislation is not a statute that merely creates an alternate mode of recovery, or provides for Courts, Tribunals or authorities with exclusive jurisdiction and thereby changes the forum of adjudication, unlike what has been essentially done by the legislation of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, hereinafter referred to as the "RDB Act". Section 2(2) of the SARFAESI Act provides that the words and expressions used and not defined in that Act, but defined in the Indian Contract Act or the TP Act or the Companies Act or the Securities and Exchange Board of India Act shall have the same meanings respectively assigned to them in those Acts. The

right of a secured creditor created by Section 13 of the Act with the support of the overriding effect of the SARFAESI Act provided by Section 35 thereof, is the creation of an interest in property and not merely a modus for recovery. The creation of that interest, which is called "security interest", is made by providing that such interest shall have effect, over and above Sections 69 and 69-A of the TP Act, which provisions provide a right for the mortgagee to sell the mortgaged property, without the intervention of the Court and for appointment of receiver in terms of the law regulating exercise of such power, as are enjoined by those provisions. The creation of security interest in terms of the SARFAESI Act, can be upon "property" which term is defined in Section 2(t) of that Act, to mean, among other things, immovable property and movable property. Recalling immediately that Section 31(i) of the SARFAESI Act provides that the provisions of that Act shall not apply to any security interest created

in agricultural land, it can be noticed that transfer of property other than agricultural land is a subject that falls in Entry 6 in List III - Concurrent List and contracts, not including contracts relating to agricultural land, including the different types and forms of contracts, fall in Entry 7 of that List. The word "contracts" in Entry 7 uses an inclusive mantle with an exclusionary provision relating to agricultural land. Therefore, all contracts including a charge, hypothecation, assignment etc. created in favour of a secured creditor to form a security interest in relation to property other than those relating to agricultural land, fall under Entry 7 in List III. The exemption provided by Section 31(i) of the SARFAESI Act takes that legislation away from the pale of any accusation that the "security interest" created thereby affects agricultural land, thereby exceeding the legislative competence of the Union referable to the subject at Entry 6 in the Concurrent List. So much so, the matter dealt

with in Section 13(1) of the SARFAESI Act read with relevant provisions in the interpretation clause of that statute clearly shows that those matters fall well within the subjects at Entries 6 and 7 of the Concurrent List.

19.It is not the contention of the petitioners that Entry 32 in List II takes within its sweep and ambit, right to property. If that were so, the States alone will have the exclusive competence to legislate on matters relating to immovable and movable properties belonging to and being dealt with by the co-operative societies. If such a view is possible, the TP Act cannot govern the immovable properties belonging to the co-operative societies. Nor would the Contract Act apply to the co-operative societies.

20.Entries 43 and 45 in List I to the Seventh Schedule were appreciated, qua Entry 32, in List II, in GBCB (supra), to notice that the statutes relating to the field of co-operative societies

that fell for consideration provided a mechanism under those legislations for resolution of disputes and that therefore, any exclusion of the jurisdiction of those authorities by the operation of the RDB Act is constitutionally impermissible in view of the exclusiveness given to the fora provided by those State legislations. In rendering that verdict, Their Lordships appreciated a classic and nice distinction between the provisions of the SARFAESI Act and the RDB Act. This can be noticed on a clear reading of the assimilation of those statutes in paragraphs 26 to 28 of that judgment. Dealing with the SARFAESI Act, the Apex Court noticed, among other things, as follows:

> "The Central Government is authorised by S.2(c)(v) of the Act to specify any other bank for the purpose of the Act. In exercise of this power, the Central Government by Notification dated 28-1-2003, has specified "co-operative bank" as defined in S.5(cci) of the BR Act as a "bank" by lifting the definition

> of 'co-operative bank' and 'primary co-operative bank' respectively from S.56 Clauses 5(cci) and (ccv) of Part V. The Parliament has thus consistently made the meaning of 'banking company' clear beyond doubt to mean 'a company engaged in banking, and not a co-operative society engaged in banking' and in Act No.23 of 1965, while amending the BR Act, it did not change the definition in S.5(c) or even in 5(d) to include co-operative banks; on the other hand, it added a separate definition of 'co-operative bank' in S.5(cci) and 'primary co-operative bank' in S.5(ccv) of S.56 of Part V of the BR Act. Parliament while enacting the Securitisation Act created a residuary power in S.2(c)(v) to specify any other bank as a bank for the purpose of that Act and in fact did specify 'co-operative banks' by Notification dated 28-1-2003."

21. Bearing in mind, one of the crucial distinctions, to wit, that the SARFAESI Act provides a residuary power to the Central Government to notify any other bank as a "bank"

for the purpose of that Act, the absence of such a provision in the RDB Act would go a long way in coming to the conclusion that the decision in GBCB is not of much avail in favour of the petitioners to accept their contention that the said judgment is applicable to hold that the provisions of the SARFAESI Act do not apply to the co-operative societies. In support, I may also refer to the decision of this Court in WP (C).No.26110 of 2007, distinguishing GBCB.

22.In dealing with Question No.1 therein, Their Lordships noticed in GBCB, that there exists a legal framework that specifically dealt with the issues pertaining to co-operatives and there was no reason or justification for covering the co-operative banks under the provisions of the RDB Act. The provisions under the co-operative societies law, including the KCS Act, in so far as they relate to resolution of disputes and recovery of amounts, are provisions which provide forum for adjudication and are not provisions

which create, by themselves, any statutory right relating to property. The provisions of the RDB Act are also those which create an alternate forum, intended to provide a quicker mode of recovery, by substituting the Tribunals constituted under that Act for the civil Courts. That necessary fall out, was in tune with the needs of the changing times. The RDB Act does not provide the creation of any interest like security interest as is created by the SARFAESI Act.

23.The legislative competence as regards SARFAESI Act falls easily within Entries 6 and 7 of List III and thereby within the competence of the Union, even as regards the co-operative banks. The impugned notification, issued by the Central Government, therefore, stands.

For the aforesaid reasons, the issues regarding the applicability of SARFAESI Act to the Kerala State Co-operative Bank, the District Co-

operative Banks and the Urban Co-operative Banks and the validity of notification dated 28-1-2003 issued by the Central Government, in exercise of power under Section 2(1)(c)(v) of the SARFAESI Act, are answered against the petitioners and these writ petitions are dismissed, preserving the right of the petitioners for appropriate statutory remedies in terms of the provisions in the SARFAESI Act. No costs.

THOTTATHIL B. RADHAKRISHNAN,
JUDGE.

Sha/